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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 24 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Latta, Marion, and Camden, South
Carolina)

) MM DOCKET NO. 93-47

) RM-8188

TO: Chief - Allocations Branch

CONSOLIDATED
MOTION TO DISMISS COUNTERPROPOSAL
AND
MOTION TO STRIKE
AND
CONTINGENT REPLY TO "RESPONSIVE COMMENTS"

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June 24, 1993

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SUMMARY

Winfas of Belhaven, Inc. ("Winfas") submits its "Consolidated Motion to Dismiss Counterproposal and Motion to Strike and Contingent Reply to 'Responsive Comments'". In this pleading, Winfas notes various discrepancies in the Comments and Counterproposal and Responsive Comments filed by Joseph Adams Ranke ("Ranke"). Ranke's Counterproposal was defective and must be dismissed, pursuant to §1.52 of the Commission's rules, since he failed to include the proper verification that must accompany any filing not filed by counsel. Ranke's Responsive Comments are similarly defective since they too failed to include the proper verification. Furthermore, Ranke's Responsive Comments are late and not authorized by the Commission's rules.

Should the Commission overlook these obvious defects, then it must consider the various flaws in Ranke's Counterproposal. For example, Ranke's Counterproposal is inferior to Winfas proposal because it proposed a second local service to Blythewood, South Carolina versus Winfas' proposal for a first local service to Latta, South Carolina. Winfas has also shown that Blythewood is already well-served by a number of other aural services. Furthermore, Winfas' proposal will provide net service to over 100,000 persons and, given the settlement that has already been reached by Winfas and the licensee of WPUB, Ranke's proposal will cause unnecessary administrative delays. Finally, Ranke has not

shown that the hamlet of Blythewood qualifies as a "community" for allotment purposes or that it is sufficiently separate from the larger community of Columbia, South Carolina.

The above facts considered, Winfas respectfully requests that Ranke's Comments and Counterproposal and Responsive Comments be stricken or, in the alternative, that the Commission consider Winfas' Contingent Reply to Ranke's Responsive Comments.

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MOTION TO DISMISS COUNTERPROPOSAL
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CONTINGENT REPLY TO "RESPONSIVE COMMENTS"

Winfas of Belhaven, Inc. ("Petitioner"), by its attorneys, hereby respectfully moves the Commission to (a) dismiss the counterproposal filed May 13, 1993, by Joseph Adams Ranke ("Ranke") as erroneously placed on public notice; and (b) strike from the record in MM Docket 93-47 the "Responsive Comments" filed June 14, 1993, by Ranke. In the event the Commission considers Ranke's pleadings, Petitioner requests that this Motion be treated as a Reply

allot FM Channel 232A at the hamlet of Blythewood, South Carolina, as its second local service. Ranke's counterproposal is mutually exclusive with Petitioner's proposal to allot Channel 232C3 to Latta, South Carolina, and modify the license of Petitioner's WLXP (formerly WWPD), Marion, South Carolina, for operation on the Class C3 channel. A Commission Public Notice, Report No. 1942, released May 25, 1993, was issued which listed Ranke's counterproposal. Ranke's counterproposal (RM-8243) must be dismissed. Ranke is not represented by counsel. He did not include in his counterproposal an affidavit verifying that the statements contained therein were accurate to the best of his knowledge. Title 47 C.F.R. §1.52 requires that an original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. This is the fate that befell a counterproponent who failed to verify her pleading in Flora and Kings, Mississippi, and Newellton, Louisiana, 7 FCC Rcd 5477 (1992).

Counterproposals must be technically and procedurally correct at the time of filing. See Fort Bragg, California, 6 FCC Rcd 5817 (1991), and Broken Arrow and Bixby, Oklahoma, and Coffeetown, Kansas, 3 FCC Rcd 6507 (1988), recon. den., 4 FCC Rcd 6981 (1989). Over a month has passed since Ranke's counterproposal was filed, and nothing in the record, including his June 14, 1993, "Responsive Comments"

contains the required verification. Therefore, as in the Flora case, Ranke's counterproposal must be dismissed.

Motion to Strike

2. The Public Notice, supra, gave interested parties 15 days, or until June 9, 1993, to file reply comments to Ranke's counterproposal. Petitioner, on May 28, 1993, timely filed reply comments which responded to Ranke's counterproposal. On June 9, 1993, Petitioner timely filed "Reply Comments to Counterproposal of Winfas of Belhaven, Inc.," that provided additional reasons why Petitioner's proposal is superior to Ranke's.

3. On June 14, 1993, Ranke filed his "Responsive Comments." His comments must be rejected for any one of four reasons. First, like his Counterproposal, Ranke's "Responsive Comments" do not contain a verification as required by Section 1.52 of the Rules. Second, Ranke's "Responsive Comments" are late. They were filed after the last day for filing reply comments in RM-8188 and after the last day for filing reply comments in RM-8243. Third, the Commission's Public Notice invited "Reply Comments" to the counterproposal - it did not afford Ranke an opportunity to patch up his defective May 13, 1993, counterproposal. Fourth, Ranke's "Responsive Comments" are substantively deficient.

4. Defective Pleading. As set forth above, Section 1.52 of the Rules requires that the original of any document filed with the Commission by a party not represented by

counsel to include an affidavit verifying that the statements contained are accurate to the best of his knowledge. Ranke's "Responsive Comments" are entirely devoid of such a verification, so they must be dismissed.

5. Late Filing. Ranke's "Responsive Comments" were filed 17 days after the reply comments were due in RM-8188, and five days after the last date for reply comments in RM-8243. The Commission has many times refused to consider late filed comments in rulemaking proceedings. See Flora, Mississippi, et al., supra, at footnote 6. Ranke offered no reason for his tardy filing, and did not request a waiver of the rules. As such, Ranke's participation in this rulemaking proceeding would be limited to Commission consideration of his Comments and Counterproposal filed May 13, 1993 (had they been properly verified.) As they were not in proper procedural form, the Commission cannot consider any of the papers filed by Ranke.

6. Unauthorized Pleading. At footnote 1 of his "Responsive Comments," Ranke offers an erroneous interpretation of the Commission's rules regarding computation of time. Ranke claims his pleading is timely filed on June 14th based on his reading of Sections 1.4(h) and 1.45(a) of the Rules. Ranke interprets these rules to afford him 10 days to respond after May 28, 1993. However, Ranke has ignored the proviso of Section 1.45 which begins the section: "Except as otherwise provided in this chapter..." The FCC specifically invited reply comments to

Ranke's counterproposal in its Public Notice, released May 25, 1993. It did not invite Ranke to file "Responsive Comments" either to its own counterproposal, or to Petitioner's Reply Comments filed May 28, 1993. Title 47 C.F.R. §1.415(a)-(d) sets out the general policy of the

(d) Ranke's counterproposal will introduce delay into the Commission's proceedings;

(e) Ranke's counterproposal is really an attempt to bring a 13th city-grade aural service to Columbia, South Carolina;

(f) Blythewood is a "Quiet Village" undeserving of local FM service under the traditional Section 307(b) rubric; and

(g) Blythewood is interdependent on Columbia and Richland County, South Carolina, and thus is not preferred under Section 307(b).

Ranke attempts to respond to these points, but his efforts are unconvincing.

Ranke Proposes Second Aural Service

8. Ranke (at para. 28) argues that the Commission should not count WBAJ(AM), Blythewood, South Carolina, as local service. Ranke traces the history of WBAJ in an attempt to cast doubt on the bona fides of WBAJ. His statements consist of nothing more than speculation and surmise that WBAJ may not go on the air in the near future. Ranke shows absolutely nothing to contradict the law Petitioner cited in its Reply Comments, Santee Cooper Broadcasting of Hilton Head, Inc., 57 RR 2d 662, 667 (Rev. Bd. 1984) (granted construction permits are considered for 307(b) purposes.) No matter how Ranke would like to rewrite the law, his counterproposal offers only second local service to Blythewood. Ranke's rantings that the

Commission, in other contexts, has chosen to ignore unbuilt construction permits are inapposite to the case at bar. Although Ranke's complaints could have been brought to the Commission's attention in any number of rulemaking proceedings of general applicability, this specific case is not the forum where Ranke's complaints can be heard. There is absolutely no reason for the Commission to consider Ranke's counterproposal as providing first local service to Blythewood. It clearly does not, and despite his arguments, Ranke's counterproposal cannot be considered under priority 3 of Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

Blythewood is Already Well Served

9. Ranke attempts to downplay Petitioner's showing that Blythewood already receives service from at least ten stations. He cites Bartow, Chauncey, Dublin, 4 FCC Rcd 6876 (1989); Clinton, Louisiana, 45 RR 2d 1587 (1979); and Westover and Grafton, West Virginia, 46 Fed. Reg. 10737 (1981), for the proposition that service from surrounding communities is no substitute for a local broadcast outlet. However, in each of those cases, the Commission dismissed arguments that communities, with no local aural station, were not worthy of a new allotment because they received service from nearby communities. See, i.e., Barton, Chauncey, Dublin, supra at 6878, ¶17. The Commission concluded that communities without a local outlet of expression should not be denied their first local service

simply because they may receive service from other nearby stations. See Clinton, Louisiana, supra, at 1588. In this case, as Petitioner has shown, Ranke's proposal does not propose the first local outlet of expression for Blythewood. Ranke's proposal is for a second aural service and, therefore, could be considered only under the Commission's priority number 4, "Other public interest matters." See Revision of FM Assignment Priorities, supra. The availability of other services is certainly a bona fide factor under priority number 4. And, even under priority number 4, Ranke's proposal is inferior to Petitioner's.

Population Served

10. At para. 37 of his "Responsive Comments," Ranke argues again that "a significant number of persons" would lose service from WLXP under Petitioner's plan. In Petitioner's Reply Comments, it was pointed out that the identical claim in Ranke's counterproposal was unsupported by population data. So Ranke has tried to shore up his argument in his "Responsive Comments." Ranke argues that Petitioner "conveniently ignored" 18,055 persons which Ranke believes will lose service from WLXP. Ranke submits unverified and unauthenticated paper writings in an attempt to substantiate his claims. Ranke makes wild accusations that Petitioner's technical consultant only considered gain area, and not loss area in making the computations. This statement is not accurate. Attached hereto is a statement prepared by the technical consultant which explains how the

net population gain figure of 131,815 persons was computed, and that loss of population as considered. The statement also reports that, based on a review of the data, actually only 12,027 persons are within the loss area. Based on revised figures, a total net gain of 131,988 persons will receive new service from Petitioner's upgraded station. The persons in the loss area are less than 10% of the total net gain, and will still receive service from other AM and FM stations. Ranke, belatedly, supplies population figures for his proposal, citing Greenup, KY and Athens, OH, 4 FCC Rcd 3843 (1989). However, Ranke has "conveniently ignored" two important factors. First, the cited case is used to compare two competing upgrade proposals. Here, we are comparing an upgrade and first local service against new second local service. But even if Greenup applied, Ranke ignored footnote No. 2 which provides:

"Additionally, populations within each county were assumed to be uniformly distributed. To prevent anomalous results, high density population centers such as identifiable communities located outside the predicted class B1 service contour of the station or located within the class A contour were excluded from the county population totals prior to performing the calculations."

In Ranke's case, he failed to exclude the population figures for Columbia, South Carolina, which would provide an anomalous result, if Greenup applied. In sum, Ranke's too-little-too-late "Responsive Comments" cannot be considered at this stage of the proceeding. To be properly considered they were required to be contained in his counterproposal filed May 13.

Delay in Initiating Improved Service

11. Ranke (at paras. 18-21) takes issue with Petitioner's observation in its Reply Comments that consideration of Ranke's counterproposal will introduce delay to this proceeding. In order to upgrade WLXP, or to allot Channel 232A at Blythewood, the frequency of WPUB-FM, Camden, South Carolina, must be changed. The licensee of WPUB-FM has stated to this Commission that he cooperated with Petitioner because of the agreement to pay \$22,000 and provide a transmitter capable of 6 kW operation. Ranke argues that Commission consideration of matters such as these would have a chilling effect upon broadcasters seeking to expand broadcast service to new communities. This is pure sophistry. The Commission has frequently encouraged agreements among broadcasters in the course of rulemaking proceedings. In Columbus, Crookston and Valentine, NE, 51 Fed. Reg. 4926 (February 10, 1986), the Commission decried allotment schemes involving multiple channel substitutions in the absence of agreements between the stations involved

reason, the Commission said, in some cases it might require a licensee to demonstrate its financial ability to affected stations, including placing the necessary funds in escrow. Petitioner merely followed the Commission's suggestions in working out a satisfactory arrangement with WPUB-FM before filing its Petition for Rulemaking, including setting up the escrow of reimbursement funds. Ranke's accusations that Petitioner and the licensee of WPUB-FM are "grandstanding" are without merit. They merely followed the Commission's suggestions for quickly improving service to the service areas of WLXP and WPUB-FM.² Petitioner's alternative to an agreement with the licensee of WPUB-FM was to embroil the parties in lengthy litigation over WPUB-FM's reluctance to change channels absent a fixed reimbursement agreement. Ranke's vituperation to the contrary is only that, and must be disregarded.

Ranke Really Seeks to Serve Columbia

12. At para. 22-23 of his "Responsive Comments," Ranke "finds it interesting" that Petitioner should question his motives regarding Blythewood, but Ranke never denies Petitioner's assertion that his proposal is an attempt to bring a 13th city-grade service to Columbia. Instead, Ranke cites Revision of FM Policies and Procedures to the effect

² Ranke's accusation (at para. 21) that Petitioner and the licensee of WPUB-FM misstated facts by referring to WPUB-FM's power increase as an "upgrade" is ridiculous. The word "upgrade" was used to simply describe the significant improvement in power for WPUB-FM, which is clearly an "upgrade" of its facilities, even though the station is not changing classes.

that the Commission will not question the intent of a party seeking assignment to a particular community. In other words, Q.E.D.

Blythewood Is Just an Interdependent Quiet Village

13. Ranke devotes para. 4-17 to a futile attempt to rebut Petitioner's showing that Latta is preferred to Blythewood under Section 307(b) of the Communications Act and Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951). Ranke argues that the mere fact that Blythewood (pop. 164) is incorporated and has a few indicia of community is enough to merit allotment of an FM channel. However, Petitioner's showing was prepared to demonstrate that Latta is preferred to Blythewood on Section 307(b) grounds. That was the purpose of the Huntington showing. Ranke is wrong when baldly asserts that Petitioner is attempting to "fool" the Commission into believing that the Richmond/San Francisco scenario is similar to the Columbia/Blythewood scenario. Ranke argues that Blythewood is not inside the Columbia Urbanized Area, so Huntington should not apply to it. Not so. In Faye & Richard Tuck, Inc., 65 RR 2d 402 (1988), the Commission adopted a "sliding scale" approach to this issue when it stated:

When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary to support a Huntington exception. On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city. (65 RR 2d at 409.)

The Commission went on to note that Huntington doctrine may still be applied to a community outside of an Urbanized Area but that "...the party seeking to have us apply Huntington to a community outside the Urbanized Area must affirmatively show that there is sufficient dependence on the central city...." Id at 411. In this case, Winfas has affirmatively shown that interdependence between the tiny town of Blythewood and the much larger city of Columbia.

14. Next, Ranke asserts that Blythewood is distinguishable from Richmond because it "a community some 700 times smaller than Richmond, California, should be expected to have the amenities that Richmond did not have in order to qualify for an allotment." Ranke reels off a litany of small communities which have been allotted stations. Ranke misses the point. Although, under some set of facts, Blythewood may be eligible for an allotment, it is not preferred to Latta under Section 307(b) of the Act. Ranke argues that the burden of invoking Huntington is on Petitioner, not Ranke. Correct. Petitioner invoked Huntington in its Reply Comments, and nothing has been offered to rebut Petitioner's assertions. Last, Ranke takes issue with Petitioner's characterization of Blythewood as a "bedroom community" for Columbia. While Petitioner provided a copy of a declaration from a person with knowledge of Blythewood, Ranke only offers a report on his own hearsay conversation with the mayor of Blythewood. No declaration of the mayor was submitted. Thus, such "evidence" cannot be

accepted for any purpose. See Federal Rules of Evidence, §801(c) and §802.

Conclusion

15. For the reasons set out herein, Ranke's "Comments and Counterproposal" dated May 13, 1993, and his "Responsive Comments" filed June 14, 1993, must be dismissed for failure to comply with the Commission's procedural rules. If they are considered at all, they must be read in light of Petitioner's Reply Comments filed May 28, 1993, and June 9, 1993, and the information provided in this filing.

Respectfully submitted,

WINFAS OF BELHAVEN, INC.

By: 

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June 24, 1993

TECHNICAL COMMENTS
MOTION TO STRIKE
COMMENTS OF JOSEPH ADAMS RANKE
WINFAS OF BELHAVEN, INC
MM DOCKET #93-47
MARION, LATTA and CAMDEN, SC
June 1993

Technical Exhibit
TE-1

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TECHNICAL COMMENTS
MOTION TO STRIKE
COMMENTS OF JOSEPH ADAMS RANKE
WINFAS OF BELHAVEN, INC
MM DOCKET #93-47
MARION, LATTA and CAMDEN, SOUTH CAROLINA
June 1993

TECHNICAL STATEMENT

1. These technical comments were prepared on behalf of Winfas of Belhaven, Inc. ("Winfas"), petitioner in MM Docket #93-47. Winfas herein responds to the late-filed comments of Joseph Adams Ranke ("Ranke"). Ranke is the party requesting the allotment of Channel 232A to Blythewood, South Carolina, which was filed as a counterproposal in the above noted docket. Both the Winfas requests and its reply comments in Docket #93-47 are on file with the Commission and are incorporated herein by reference.

DISCUSSION

2. Ranke in its comments makes reference to the number of persons within the present WWPd 1.0 mV/m contour who would be unable to receive 1.0 mV/m service from an improved WWPd operating on Channel 232C3 at Latta, South Carolina. Utilizing the facilities of Dataworld, Ranke has calculated the population within the existing and proposed WWPd contour. Ranke estimates that 18,055 persons would lose service from WWPd should the Commission act favorably on the Winfas

request. It notes that this loss would be 23.5% of the existing population within the 1.0 mV/m contour. Ranke claims that Winfas failed to remove the persons in the loss area from its overall gain figure.

3. The manner in which Ranke "estimated" the persons within the loss area is uncertain. Winfas, in its reply comments, calculated the persons within the loss area as follows: first, the existing authorized 1.0 mV/m contour was calculated and transposed (to scale) onto a United States Census map of the pertinent counties of South Carolina. The theoretical 1.0 mV/m contour of the proposed C3 at Latta, South Carolina, using the site proposed in the Commission's notice was then calculated and plotted onto the same census map. Simultaneously, the population within both individual contours was determined. ¹

4. Using the actual census map, the area of the individual census divisions in each county in which loss occurred was calculated. From that figure, the percentage of the division which would theoretically lose service from WWPDP was calculated. ² In divisions in which towns or cities were located, the amount of the population in the cities was

1) The population within the individual 1.0 mV/m contours was extracted from the PL 94-171 files (1990 Census).

2) The percentages of the divisions and towns was determined using a polar planimeter.

removed, leaving only the persons residing in the division. Using the percentage of the division in the loss area, the total number of persons within that loss area was determined. If the loss area completely (or in part) encompassed a town in the division, those persons were added to the total in the division. ³

5. Based on our review (and update) of the loss area, we find that 12,027 persons, not 18,055 persons as claimed by Ranke, are within the loss area. ⁴ In addition, Ranke notes that Winfas failed to consider the actual net gain figures in its original reply. On the contrary, in the Technical Exhibit attached to Winfas' reply comments, Paragraph 13 states that 131,815 persons would receive new service from the Winfas request. This number was based on the total population within the theoretical Latta C3 contour, less the persons in the theoretical loss area, less the persons presently receiving service from WWPB on Channel 232A. Based on revised figures, a total of 131,998 persons net will

receive new service from the Latta C3 contour.

6. The new service which would result if WWPB were to upgrade to a C3 facility would more than double its present Class A service population. The persons in the loss area are less than 10% of the total net gain and will still receive service from other AM and FM stations. Further, the provision of first local service to Latta, South Carolina, without the removal of the only local service from Marion, South Carolina, should be considered as in the public interest.

7. This technical statement was prepared on behalf of Winfas of Belhaven, Inc., by Bromo Communications, Inc., its Technical Consultants. All of the information contained herein is true and accurate to the best of our belief and knowledge.

AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT

State of Georgia)
St. Simons Island)
County of Glynn)

ss:

JEFFERSON G. BROCK being duly sworn, deposes and says that

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 24th day of June, 1993, copies of the foregoing were mailed, postage prepaid, to the following:

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